

BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA )  
 INDIAN COMMUNITY, ET AL, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )

Docket No. 236-C

Defendant.

Decided: November 17, 1972

Appearances:

Z. Simpson Cox, Attorney for Plaintiff.

David M. Marshall, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

In this docket plaintiff claims that defendant actively interfered with, and failed to protect from the interference of others, plaintiff's right to the use of the waters of the Gila River. Plaintiff alleges that its right to the use of these waters arises from the western water law doctrine of prior appropriation and from the doctrine pronounced by the Supreme Court in Winters v. United States, 207 U.S.

564 (1908).<sup>1/</sup> The petition further alleges that plaintiff was deprived of its right to the use of Gila River water as a result of defendant having entered into several contracts with non-Indian water users, and having stipulated to the entry of the decree apportioning the waters of the Gila River in United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935). Plaintiff also alleges that defendant failed to protect it from wrongful actions of non-Indian settlers which resulted in plaintiff being deprived of the use of Gila River waters.

At a pretrial conference held October 12, 1970, it was agreed that this docket would be tried in the following stages: (1) the extent of the water rights of the plaintiff, if any; (2) whether the water rights of the plaintiff were wrongfully taken by the defendant; and (3) the extent of damages if any. It was further agreed that prior to trial plaintiff would file a motion raising the legal issues in stage (1). Accordingly, on March 18, 1971, the plaintiff filed a motion requesting that the Commission enter a preliminary adjudication on the extent of plaintiff's right to the use of the waters of the Gila River. The defendant, in a response filed September 3, 1971,

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<sup>1/</sup> Plaintiff's petition also alleges that plaintiff has a right, conferred by the Act of June 7, 1924, 43 Stat. 475, to the water stored in the San Carlos Reservoir. Neither party, however, has briefed the question of plaintiff's right to stored waters. Accordingly, in this opinion the Commission will concern itself solely with plaintiff's rights in the natural flow of the Gila River. The Ninth Circuit Court of Appeals has defined such flow as follows: ". . . The natural flow of the stream is the amount of water which would flow therein if there was no artificial interference with the flow. . . ." Gila Valley Irr. Dist. v. United States, 118 F.2d 507 (9th Cir. 1941).

opposed plaintiff's motion, asserting that the Commission should not adjudicate plaintiff's rights. Plaintiff replied December 13, 1971. For the reasons indicated below and to the extent indicated below we grant plaintiff's motion. In short, we think that if plaintiff seeks to prove that it was deprived of water it could have used, by wrongful acts or omissions of defendant, it must first prove that it had a right to receive the water. In this opinion the Commission intends to provide some definition of plaintiff's water rights that will assist the parties in preparing evidence for further proceedings.

The motion asserts two sources for plaintiff's water rights. The first is the doctrine of prior appropriation.<sup>2/</sup> Plaintiff claims that under this doctrine it has the right, as of an immemorial date of priority, to divert 210,000 acre-feet of water per year.<sup>3/</sup> The second source of water rights asserted in the motion is the Winters Doctrine,

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<sup>2/</sup> . . . To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually, forever, subject only to the right of prior appropriations. Arizona v. California, 283 U.S. 423, 459 (1931).

. . . Under that law [of prior appropriation] the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. "First in time, first in right" is the shorthand expression of this legal principle. Arizona v. California, 373 U.S. 546, 555 (1963).

<sup>3/</sup> "An 'acre-foot' is that quantity of water which is sufficient to cover one square acre of land with water one foot deep." Rank v. Krug, 142 F. Supp. 1, 37 (D.C. Cal. 1956). The acre-foot is a measure of volume.

which provides generally that when the United States creates an Indian reservation in arid territory, it thereby reserves to the tribe sufficient water to irrigate the arable lands of the reservation. Under this doctrine plaintiff claims that it has the right to divert a total of 782,574 acre-feet per year.

In its response defendant asserts (1) that it is unnecessary for the Commission to determine the extent of plaintiff's water rights because its right to recover, if any, is to be measured against the acreage it actually irrigated in the years prior to the alleged loss, (2) that the Commission lacks the jurisdiction to relitigate the water rights of the plaintiff, such rights having been adjudicated by the United States District Court for the District of Arizona which retained exclusive jurisdiction over the waters of the Gila River, and (3) that to the extent that plaintiff's claim involves allotted lands it is a conglomerate of individual claims rather than a tribal claim and is thus beyond the jurisdiction of the Commission.

Defendant's first contention, that the Commission can adjudicate plaintiff's claim without determining the extent of plaintiff's water rights, is without merit. Plaintiff's claim is that because of action and inaction on the part of defendant it was deprived of the use of Gila River water which it had the right to use and could have used. Clearly the Commission cannot determine whether plaintiff has suffered any loss of water without determining the amount of water, if any, to which plaintiff was entitled. Once that determination is made the

Commission will be able to decide whether plaintiff has suffered any loss, whether defendant is liable for such loss, and what damages plaintiff may be entitled to.

As to defendant's second contention, that the Commission lacks jurisdiction to relitigate plaintiff's water rights, the Commission is of the opinion that it does have jurisdiction to determine the extent of plaintiff's right to the use of the Gila River. It is clear that plaintiff's claim is cognizable under Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970). It is a claim by an Indian tribe against the United States and it fits within one or more of the types of claim described in clauses (1) through (5) of section 2. Thus, having jurisdiction to adjudicate the claim, the Commission must necessarily have the jurisdiction to determine an issue the resolution of which is essential to the adjudication of the claim. As we have already stated, a determination of the extent of plaintiff's right to Gila River water is necessary to our adjudication of plaintiff's claim.

Defendant also suggests, as part of this contention, that the Commission is not competent to adjudicate plaintiff's water rights. It is defendant's position that such an adjudication involves an area of law in which the Commission has no expertise and would require the Commission to engage in an administrative task which it is not equipped to handle. We cannot agree. The determinations we must make in this case require no greater expertise than does the determination of the extent of a tribe's aboriginal title area or the value of a vast tract

of land at a remote date. The Commission will be required to examine the authorities to ascertain the applicable legal principles and apply those principles to the proven facts. With appropriate humility, we shall undertake to do that which must be done to adjudicate this claim.

Contrary to the thrust of defendant's argument, plaintiff has not requested that the Commission reapportion the waters of the Gila River among itself and non-Indian water users. Had it requested such relief we would certainly agree with the defendant that we lacked both the jurisdiction and the capability to comply. The apportionment and distribution of the waters of the Gila River is within the exclusive jurisdiction of the United States District Court for the District of Arizona. Rather the plaintiff has requested that we determine, as between itself and the defendant, its water rights in the Gila River. This determination is merely one step in the adjudication of plaintiff's claim, analogous to the title phase in a land claim. Because non-Indian water users are not party to this claim, our determination can have no direct effect on the actual distribution of Gila River water, nor can it alter the correlative right of the various Gila River water users. There is no reason why we cannot make findings on plaintiff's water rights to the extent necessary to decide the claim.

The Commission is of the opinion that the last of defendant's defenses cannot be decided in this opinion. The determination of which, if any, of plaintiff's lands have been allotted, and when title passed to individual allottees must await a trial. Of course, the

Commission agrees with defendant that it lacks jurisdiction to adjudicate individual claims. We also agree that a portion of a tribe's water rights passes to each allottee when a reservation is allotted. See United States v. Powers, 305 U.S. 527 (1939); Anderson v. Spear-Morgan Livestock Co., 79 P.2d 667 (Mont. 1938). However, until the time when beneficial title to tracts of tribal land actually vests in individual allottees, the right to the use of water remains in the tribe. This Commission does have jurisdiction to adjudicate claims based on such tribal rights.

The means for the distribution of Gila River water has been defined since 1935 by the Gila Decree. United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935). We discuss the provisions of this decree and its effect on the current litigation later in this opinion. The adjudication of this claim, however, requires that the Commission also determine the extent of plaintiff's water rights in the absence of the Gila Decree. We now address ourselves to that question.

Plaintiff asserts initially that it acquired water rights under the doctrine of prior appropriation. It is unnecessary, however, for the Commission to determine whether the prior appropriation doctrine applies to Indian tribes.<sup>4/</sup> We have concluded that plaintiff's

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4/ The Commission is unable to find any case which decides whether Indian tribes can obtain water rights under the prior appropriation doctrine. The Ninth Circuit has ruled twice that waters reserved as part of an Indian reservation are not subject to the doctrine. See United States v. Ahtanum Irrigation District, 236 F. 2d 321, 328 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957); United States v. McIntire, 101 F. 2d 650 (9th Cir. 1939). The Winters Doctrine, which we discuss below, protects tribal water rights regardless of priority of appropriation.

right to use Gila River water is not dependent on that doctrine. In another docket we have concluded that the plaintiff had aboriginal title to a large tract of land in Arizona and that its title was not extinguished prior to the creation of the first Gila River reservation within the tract. Gila River Pima-Maricopa Indian Community v. United States, Docket 228, 24 Ind. Cl. Comm. 301 (1970). Plaintiff's aboriginal title entitled it to use the land in its traditional Indian fashion, including the irrigation of its agricultural lands with Gila River water. Thus the plaintiff had as part of its aboriginal title the right to divert water from the Gila River for the purpose of irrigating its land. The amount of water plaintiff was entitled to divert in any given year was no less than the amount necessary to irrigate the lands which it actually had under cultivation. This water right terminated with the extinguishment of plaintiff's aboriginal title.

The plaintiff further contends that it acquired water rights under the Winters Doctrine. This principle was pronounced by the Supreme Court in the case Winters v. United States, 207 U.S. 564 (1908). In Winters, the United States brought a suit, on behalf of the tribes of the Fort Belknap Indian Reservation, seeking to enjoin non-Indian settlers from diverting water from the Milk River in Montana. The requested injunction was granted<sup>5/</sup> by the trial court and affirmed by

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<sup>5/</sup> The order enjoined the defendants from interfering in any manner with the use by the reservation of 5000 inches of the water of the river. 207 U.S. at 565.



the Ninth Circuit Court of Appeals. In reviewing the case on appeal the Supreme Court interpreted the agreement of May 1888 which resulted in the creation of the Fort Belknap Reservation.<sup>6/</sup> Although this agreement did not contain an express provision reserving water for the Indians, the Court concluded that both the United States and the Indians had intended to reserve water. The Court stressed two factors: that the reservation was part of a much larger tract which the Indians had the right to occupy; and that the lands were arid and unable to support life without irrigation. Under the circumstances the Court was unwilling to believe that the Indians would deliberately surrender and the United States deliberately take away the means of irrigating the lands of the reservation. The Court therefore concluded that in creating the reservation the United States impliedly reserved to the tribes the right to divert water from the Milk River.

In the Winters case the reservation was created by an agreement between the United States and the Indian tribes. In United States v. Walker River Irr. Dist., 104 F. 2d 334 (9th Cir. 1939), the Ninth Circuit Court of Appeals extended the Winters Doctrine to include situations where reservations were created by act of Congress or by Executive order. In this case, as in Winters, the United States brought suit to enjoin non-Indian water users from diverting water from the Walker River in Nevada. The trial court ruled in favor of

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<sup>6/</sup> The agreement was ratified by the Act of May 1, 1888, 25 Stat. 113.

the defendants, holding that the Winters Doctrine was applicable only where the reservation was created by treaty or agreement. The appellate court reversed, stating that the basic question for determination in applying the Winters Doctrine "was one of intent -- whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved." Id. at 336. The court then stated,

. . . We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the Court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be found by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved. . . . [Id.]

Evaluating the evidence, the court found that the Walker River Reservation had been set aside to protect the Indians from the encroachment of non-Indians and to allow the Indians to become successful agriculturists. The court then reasoned as follows:

. . . It required little foresight to anticipate the speedy settlement by the whites of the valleys of the Walker River and the consequent diversion of the waters of the stream which actually took place. The necessity of having a water supply if any crops were to be produced on the reservation was known to the Department. It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive. . . . The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by settlers above. [Id. at 339.]





























